

Congress of the United States

Washington, DC 20515

January 9, 2005

Glenn A. Fine, Inspector General
United States Department of Justice
Office of the Inspector General
950 Pennsylvania Avenue, N.W., Suite 4706
Washington, DC 20530-0001

Dear Mr. Fine:

This is in response to your letter of January 4, 2006, in which you state your view that investigation by your office of the Attorney General's authorization of domestic warrantless surveillance by the National Security Agency (NSA) would fall outside the scope of your office's jurisdiction but instead within the jurisdiction of the Department of Justice's Office of Professional Responsibility (OPR).

We write to disagree with this conclusion and to renew our request that you promptly begin an investigation of these alleged abuses, pursuant to your statutory responsibilities under the Inspector General Act.

Under that law, the Department of Justice (DOJ) Office of Inspector General has the "duty and responsibility" to report to Congress "abuses and deficiencies relating to the administration of programs and operations" within the Department of Justice.¹ Furthermore, under Section 1001 of the PATRIOT Act, your office is designated as the one entity responsible for the review of information and complaints regarding civil rights and civil liberties violations by DOJ employees and officials.² We disagree with your characterization of the jurisdiction of DOJ's Office of Professional Responsibility in this matter. Under the order establishing the OPR, its jurisdiction extends only to allegations of misconduct by attorneys in the "exercise of their authority to investigate, litigate or provide legal advice."³ This authorizing language parallels the jurisdictional language in the Inspector General Act, allowing OPR referrals for allegations of misconduct relating to the "exercise of the authority of an attorney to investigate, litigate, or provide legal advice."⁴

Notwithstanding your characterization to the contrary, the allegations at issue here do not relate to the Attorney General's provision of legal advice to any party, but rather allegations of his non-compliance with the Foreign Intelligence Surveillance Act (FISA) in the conduct of his official duties. Your letter fails to explain how, in the absence of any investigation by your office, you have concluded that the Attorney General's conduct in question extends no further than "provid[ing] legal advice."

¹ 5 app. U.S.C. § 4(a)(5).

² P.L. 107-56, Title X, § 1001, 115 Stat. 391.

³ "Jurisdiction for Investigation of Allegations of Misconduct by Department of Justice Employees," Order No. 1931-94, Office of the Attorney General (Nov. 8, 1994).

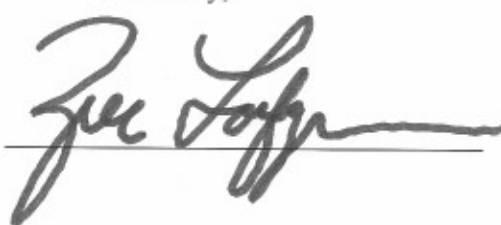
⁴ 5 app. U.S.C. § 8E(b)(3).

A refusal to investigate the Attorney General may not rest on the mere fact of his being an attorney in the employ of DOJ. Such a reading of the Inspector General Act would effectively eviscerate the investigation by your office of any attorneys engaged in official misconduct, largely defeating our purpose in creating your office. It would hardly be a sensible reading of your statutory duty that empowers you to investigate only the non-attorneys employed at the Department of Justice.

Federal courts have been careful to distinguish between the roles government employees fill as attorneys providing counsel as opposed to as officials conducting government business. The D.C. Circuit Court of Appeals has ruled that an attorney in the White House Counsel's office may not refuse to testify about possible criminal conduct on the basis of attorney-client privilege. As the Court of Appeals stated, "the Office of the President is a part of the federal government, consisting of government employees doing government business, and neither legal authority nor policy nor experience suggests that a federal government entity can maintain the ordinary common law attorney-client privilege to withhold information relating to a federal criminal offense."⁵ The Court further stated, "With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. The constitutional responsibility of the President, and all members of the Executive Branch, is to 'take Care that the Laws be faithfully executed.' U.S. CONST. art. II, § 3."⁶ In light of this careful distinction between government employees acting as legal counsel versus acting as officials conducting government business, we fail to see how you conclude, without any investigation, that the Attorney General's alleged criminal violations of FISA constitute the simple provision of legal advice.⁷

For the foregoing reasons, we disagree with your proffered basis for refusing to conduct the investigation we called for in our previous letter – an investigation that is your "duty and responsibility" under the law.⁸ We ask that you respond in writing by January 11, 2006, confirming that you will conduct the investigation we called for in our previous letter and present your results to us by January 31. We request your immediate attention to this highly serious matter.

Sincerely,



⁵ *In re: Bruce R. Lindsey (Grand Jury Testimony)*, 148 F.3d 1100, 1102 (D.C. Cir. 1998), cert. denied *Office of the President v. Office of Independent Counsel*, 525 U.S. 996 (1998).

⁶ *Id.* at 1108.

⁷ See *infra* n. 4.

⁸ See *infra* n. 1.

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cc: H. Marshall Jarrett, Counsel
Office of Professional Responsibility, Department of Justice